point, is no more than an argument that they were in excess of jurisdiction because they were wrong and here we pause to point out that despite numerous statements appearing throughout the petition, no court has ever held and decreed that any of the tax deeds involved were void. It is true that in the Hinton and Grass Creek cases there were findings and conclusions to that effect but the findings and conclusions are not a judgment or decree:

Galiger et. al. v. McNulty et. al., 80 Mont. 339, 351, 352, 260 Pac. 401;

Blaser v. Clinton Irrigation District et. al., 100 Mont. 459, 464, 53 Pac. (2d) 1141;

Conway et. al. v. Fabian et. al., 108 Mont. 287, 303, 89 Pac. (2d) 1022.

In this connection it should be pointed out that the contract between the petitioner Hinton and John Whelan, deceased, referred to at pages 8 through 12 of the petition, could not have the effect of limiting the jurisdiction of the Court in the Staunton action to determine the interests of the parties there before it in the lands and mineral rights there involved. It should also be pointed out that at the time of that action the petitioner Hinton had no foundation of title whatsoever in or to the minerals and his title to the surface was dependent upon conveyance from the estate of John Whelan in which the minerals were specifically reserved. If the Staunton action resulted in the taking of any property without due process

of law, it was not the property of the petitioner Hinton, but the property of his predecessors in claim which was so taken.

It is true that the respondents in this cause were not before the court in any of the three previous actions but for the reasons hereinafter presented that fact is of no aid or assistance to the petitioners and the most glaring fault in the petitioners' case becomes apparent when consideration is given to their attack upon these particular respondents. The interests of the individual respondents are one per cent royalty interests acquired by them from John Whelan. Exhibits C and F, certified to this Court and see Stipulation, Tr. p. 94-95. It is these interests and nothing more to which title is quieted by the decree. Throughout the petition the petitioners recognize that these interests of the individual respondents are royalty interests. Their action was brought to remove clouds upon their title to these royalty interests. See Appendix A, p. 24 of Petition.

In the case of Rist vs. Toole County, 117 Mont. 426, 159 Pac. (2d) 340, the Supreme Court of Montana discussed the nature of royalty interests as follows:

> "This court long ago adopted the standard and universal definition of royalty. In Minerman v. Baldwin, 67 Mont. 417, 215 Pac. 1103, 1108, it is said: 'The word has a very well understood and definite meaning in mining and oil operations. As thus used, it means *a share of the produce or profit paid to the owner of the property.* Webster's Dictionary. The ex-

pression 'a share of the produce or profit paid to the *owner* of the property' is quite different from a share or interest in the property itself. It recognizes that the originator of the royalty is still the owner of the real property to which it relates, and that the assignee's interest is only in the 'produce or profit' therefrom, *namely, in the personal property which the owner is to receive for the granted privilege of producing minerals from his land.*" (Emphasis supplied).

In other words, when John Whelan conveyed a one per cent royalty to each of the individual respondents herein he retained complete ownership of the minerals and conveyed only a right to share in the proceeds thereof. At page 433 of 117 Mont. the Montana Supreme Court continued as follows:

"In that case this court pointed out that the royalty, whether of the kind known as a landowner's royalty or that known as overriding royalty, constituted an interest in the privilege of producing minerals, and in the personal property when and as severed and produced from the land, *but not an interest in the minerals in place*. In other words, it is privilege a prendre, and not a portion of the fee-simple title. To the same effect is Broderick v. Stevenson Consolidated Oil Co., supra.

"Thus the concept of royalty is very different from that of the fee-simple title to minerals in place in the ground, as involved in Krutzfeld v. Stevenson et. al.; Broderick v. Stevenson Consolidated Oil Co., and Hodgkiss v. Northland Petroleum Consolidated, supra." (Emphasis supplied).

As we have pointed out, the petitioners seem to recognize that it was only a royalty that was conveyed to the individual respondents and they cannot depart from that position for the grantor made his position clear beyond any question. Each of the royalty conveyances to the individual respondents, O'Neill and Freibert, Exhibits C and D certified to this Court, and the royalty conveyances to the predecessor of the respondent Maris, Exhibit F certified to this Court, contain a provision substantially as follows:

> "This indenture is made for the purpose of conveying unto the said party of the second part, his heirs, executors, administrators, successors and assigns, the said one per cent (1%) of * * * all oil, gas, hydrocarbons and other minerals produced and delivered in pipelines, or otherwise produced and marketed from the above described premises, and shall apply to all production or delivery under any lease or contract for development or production now existing or *which may at any subsequent time be entered into or executed by the said party of the first part, his heirs, executors, administrators, successors or assigns,* affecting the above described land." (Emphasis supplied).

It is clear that the grantor retained in himself, his heirs, executors, administrators, successors or assigns full power over leasing for producetion. In Rist vs. Toole County, supra, 117 Mont. 426, 436, 159 Pac. (2d) 340, the Supreme Court of Montana said:

> "It will be noted that Professor Summers refers to the fact mentioned above in connection with our

discussion of the definition of 'royalty,' that if the conveyance is of a portion of the fee-simple title to minerals in the ground, the grantee becomes a tenant in common with the grantor as to that title and must join in subsequent leases; otherwise his interest will not be included. *Therefore, the grant of royalty under future leases is inconsistent with an intention to convey part of the mineral title itself.*

"The authorities emphasize that it is only by virtue of his ownership of the minerals in place that the lessor is entitled to exact a royalty of part of the oil and gas produced, but that it is neither necessary nor usual for him to convey any part of the mineral title in order to transfer the corresponding royalty interest. Thus where only a royalty interest is purported to be transferred there is no justification for an attempt to read into the grant another and greater interest. This is true whether the express recital is of a royalty interest in general, or of a royalty interest under any and all leases thereafter given. *In fact, where the instrument, as here, expressly purports to include royalties under future leases, it is logically impossible to infer the conveyance of mineral interests.* For, as noted above, it is impossible for the grantor to make leases covering mineral interests theretofore conveyed to others, and futile for him to attempt the assignment of the corresponding royalties. *It follows that the express assignment of royalty in future leases utterly negatives an intent to convey title to the assignee so as to make him a tenant in common, with full authority over his own share of the ownership. It is only where no title, but only a royalty interest is transferred, that*

a reference to royalty under future leases can have any meaning." (Emphasis supplied).

Clearly the interests of the individual respondents did not exist prior to the conveyance thereof to them by John Whelan. They exist only by virtue of these conveyances and relate to the ownership of the minerals by John Whelan's successors but are not themselves an interest in minerals in place. These respondents have never conveyed away nor assigned their royalty interests and the petitioners seek to remove clouds upon *their* title to these royalty interests and now contend that *their* property, again these royalty interests, has been taken from them without due process of law. The absurdity inherent in petitioners' purported cause of action and in their present claim that they have been divested of property without due process of law is apparent. How can they remove clouds upon title which they do not and have never had? How can property which they have never owned be taken from them without due process of law? The only basis of title advanced by the petitioners are deeds which, if they conveyed anything at all, would convey an interest in the minerals in place. They have shown no evidence whatsoever of title to the royalty interests claimed by these respondents and in an action of this type as they themselves have pointed out, the plaintiff must succeed on the strength of his own title and not on the weakness of the title of his adversary.

Hinton v. Staunton, 124 Mont. 534, 539, 228 Pac. (2d) 461;

McAlpin v. Smith, 123 Mont. 391, 213 Pac. (2d) 602;

Arnow v. Bishop, 107 Mont. 317, 86 Pac. (2d) 644.

The only way in which the petitioners could defeat respondents' royalty interests would be by defeating the title to the minerals upon which those royalty interests depend. Certainly the petitioners cannot defeat the title to which the royalty interests relate for the holders of that title, the successors of John Whelan, are not parties to this action and even if they were, the Staunton case, the Hinton case and the Grass Creek case are beyond any question res judicata as between these petitioners and the holders of the title to the minerals in place and against them these petitioners have absolutely no claim of title to the minerals in place.

CONCLUSION

As against these respondents the petitioners attempted to acquire by this action royalty interests owned by these respondents which depend upon mineral titles concerning which their claims have been foreclosed by three prior decisions. They have shown absolutely no title in themselves to these royalty interests and the only way that they could destroy these royalty interests would be by defeating the title upon which the royalty interests depend, which, in turn would require the overturning of the three

previous decisions, two of which were appealed to and affirmed by the Supreme Court of Montana. We use the word "destroy" advisedly in preference to the word "acquire" because there is no way in which the petitioners could acquire these royalty interests except by purchase from these respondents. The petitioners have presented no valid reason for overturning the previous decisions and had they done so, they would not be entitled to prevail for the prevailing parties in those decisions are not before the Court. The petitioners have failed to show cause entitling them to any relief whatsoever and specifically have failed to show that they have been deprived of property without due process of law.

It is therefore submitted that no reason exists for the granting of this petition for certiorari.

Respectfully submitted,

MYLES J. THOMAS,
517 Power Block—P.O. Box 252
Helena, Montana
Attorney for Respondents,
J. A. Freibert, Francis Drake
O'Neill and Althea V. Maris.

W. S. MATHER,
P. O. Box 1067
Roundup, Montana
RALPH J. ANDERSON,
STANLEY P. SORENSON,
517 Power Block—P.O. Box 235
Helena, Montana
Of Counsel